Therefore a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.

2. Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. The forms of discrimination which may be thus judicially identified include cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation.

3. Article 1 of Council Directive 75/117/EEC which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty in no way alters the content or scope of that principle as defined in the Treaty.

In Case 96/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Employment Appeal Tribunal of the United Kingdom for a preliminary ruling in the action pending before that tribunal between

J. P. JENKINS

and

KINGSGATE (CLOTHING PRODUCTIONS) LTD,

on the interpretation of Article 119 of the EEC Treaty and of Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Presidents of Chambers, A. O'Keeffe, G. Bosco, A. Touffait, O. Due and U. Everling, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. Kingsgate (Clothing Productions) Ltd (hereinafter referred to as "Kingsgate"), manufacturers of ladies' clothing, have a factory in Harlow (Essex) where 89 people are employed, of whom 35 are male and 54 female. All the male employees except one work full-time (40 hours per week); of the female employees, however, five work part-time. The employees who work full-time are graded into six categories.

In November 1975, shortly before the entry into force of the Equal Pay Act 1970, Kingsgate fixed the hourly pay for full-time work at the same rate for both men and women. It considered, however, that there was a fundamental difference between part-time work and full-time work, independently of the sex of the worker, which justified a difference in pay. The pay for part-time work was therefore fixed at a rate 10% lower than that applicable to full-time work. That difference was not based on either the characteristics of the worker or the quality of the work. It was motivated by the need:

(a) to discourage absenteeism;

(b) to ensure that the expensive machinery in the factory was being used to its fullest extent, and

(c) to encourage greater productivity.

Among the male employees at Kingsgate the *only* one who works half-time is a worker who was recently retired and who was subsequently and exceptionally re-engaged to work part-time (16 hours per week) on work classed in Grade 1.

2. Mrs Jeanette Pauline Jenkins, an employee of Kingsgate, works part-time, or to be more precise "more or less 30 hours per week". She was engaged as a special machinist and does work classed in Grade 2.

Mrs Jenkins took the view that she was unfairly prejudiced by the fact that, although she was engaged to perform the same work as that performed by one of her male colleagues (Mr Bannan), employed full-time, she drew an hourly rate of pay lower than that drawn by her colleague; she therefore brought an action before an Industrial Tribunal. In support of her complaint she alleged that the difference in pay contravened the equality clause incorporated into her contract and the provisions of Section 1 (2) (a) of the Equal Pay Act, according to which the principle of equal pay for men and women applies in every case where:

"a woman is employed on 'like work' with a man in the same employment".

The employer acknowledged that Mrs Jenkins had been engaged to perform like work with that of Mr Bannan. Nevertheless, the employer maintained that there was "a material difference, other than the difference of sex" between her case and his.

The Industrial Tribunal rejected the complaint and held that working for a period representing 75% of the full working hours (30 hours = 75% of 40 hours) constituted a "material difference, other than the difference of sex", sufficient to justify, in Mrs Jenkins's case, an hourly rate of pay 10% lower than that of her male colleague, in accordance with Section 1 (3) of the Equal Pay Act, which reads:

"An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his."

3. Mrs Jenkins appealed against that decision to the Employment Appeal Tribunal, which, by an order of 25 February 1980, referred the following questions to the Court for a preliminary ruling:

"1. Does the principle of equal pay, contained in Article 119 of the EEC Treaty and Article 1 of the Council Directive of 10 February 1975, require that pay for work at time rates shall be the same, irrespective:

   (a) of the number of hours worked each week; or

   (b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?

2. If the answer to Question 1 (a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

3. Would the answer to Question 1 (a) or (b) or 2 be different (and, if so, in what respects) if it were shown that

a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay?

4. Are the relevant provisions of Article 119 of the EEC Treaty or Article 1 of the said directive, as the case may be, directly applicable in Member States in the circumstances of the present case?"

The order making the reference was lodged at the Court Registry on 12 March 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Mrs J. P. Jenkins, represented by A. Lester, QC, and J. Hand, Barrister, instructed by Messrs Mills, Curry and Gaskell, Solicitors, by the Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor's Department, by the Government of the Kingdom of Belgium, represented by J. Dufour, Conseiller Adjoint, Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by J. Forman, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to give a written reply by 1 November 1980 to the following question: "Do any of the Member States other than Belgium and the United Kingdom have legislation requiring the pay of part-time workers to be proportional to the pay of full-time workers?"

The Commission replied to the question in a letter dated 28 October 1980.

II — Written observations submitted to the Court

Mrs Jenkins observes that the issue raised in this case is whether, and if so in what circumstances, the principle of equal pay contained in Article 119 of the Treaty and Article 1 of Council Directive 75/117/EEC applies to part-time workers in the European Community.

She submits that it might be helpful at the outset to place this issue within its wider context, recalling that by far the majority of part-time workers in the Community are women and that in the United Kingdom the proportion of women in part-time work is even greater than in the other Member States.

Section 1 (3) of the Equal Pay Act 1970 provides that a variation between a woman's contract and that of a man is justifiable if the employer proves that it is due to a material difference (other than the difference of sex) between her case and his. In certain cases before the Employment Appeal Tribunal, which the Court of Appeal has not had occasion to consider, it has been held that a difference in the number of hours worked does fall within the concept of a material difference.

As against those decisions, Mrs Jenkins maintains that they are, in any event, incompatible with the principle enunciated by the Court of Appeal in *Clay Cross (Quarry Services) Ltd* v *Fletcher* [1979] ICR 1 according to which the number of hours worked per week and the intentions of the employer are extrinsic circumstances of little relevance as regards proof of the absence of discrimination based on sex. Mrs Jenkins also refers to the principle enunciated by the Supreme Court of the United States in *Griggs* v *Duke Power Co* 401 US 424 (1971), according to which what must be prohibited are not merely practices which are intended to discriminate, but equally those which are discriminatory in their effect, irrespective of the intentions of their authors.

Having thus reviewed the current legislation and case-law in the United Kingdom touching on the present issue, Mrs Jenkins proceeds to consider Questions 1, 2 and 3 which, in her opinion, are closely linked and may conveniently be examined together. She observes that the answers to those questions are needed irrespective of the answer to Question 4 regarding the direct effect in Member States of the principle of equal pay. That is because, as a matter of national law, if Section 1 (3) of the Equal Pay Act is held by the courts and tribunals of the United Kingdom to be ambiguous in the circumstances of the present case the answers to the first three questions will be relevant for the purpose of resolving any such ambiguity: cf. Case 111/75 *Mazzalai* v *Ferrovia del Renon* [1976] ECR 657 at p. 665 (paragraphs 7 to ii).

She recalls, first, the double aim, economic and social, of Article 119 and asserts that that aim would be frustrated if the principle of equal pay were effectively confined to full-time workers. Such a conclusion would create competitive disadvantages both for undertakings in countries which apply the principle of equal pay equally to part-time workers and for those in States where the proportion of available part-time workers is lower. It would also discriminate against women, who are generally prevented by their family obligations and circumstances from being able to work as many hours per week as men doing the same work.

Such a restrictive interpretation of the principle of equal pay would not only have absurd consequences (for example, different hourly rates of pay for persons working 40 and 39 hours per week), but, what is more, would facilitate widespread misapplication of the principle to the detriment of women, who constitute the great majority of part-time workers.

If an employer wished to encourage his employees to work longer hours, he should pay a suitable overtime rate and not reduce the pay of those working part-time.

Subparagraph (b) of the third paragraph of Article 119, states that "... pay for work at time rates shall be the same for the same job". What decides whether the job is the same is the nature of the work performed by the workers concerned, and not the number of hours worked each week. The fact that it may be

advantageous for the employer to pay a higher basic rate to those working 40 hours per week than to those working fewer hours is an extrinsic and irrelevant consideration as regards the principle of equal pay. Indeed, if that were not the case, the employer would be able to pay women less than men for equal work, not on the ground that they were women but because they could be recruited for less pay than men and that this was to the employer's commercial benefit.

It is not contested by Mrs Jenkins that in certain situations the difference in hourly rates of pay between a female part-time worker and a male full-time worker may be objectively justified by the operation of factors which are unconnected with any discrimination on the grounds of sex. It might be the case, for example, that the male worker has superior skill or qualifications or longer service. That exception to the principle of equal pay must be strictly confined, however, to real and relevant differences which are personal to the workers concerned, and cannot include the employer's motives where they are not related to the personal qualities of the particular workers.

In Mrs Jenkins's opinion the reply to be given to Question 1 should therefore be in the affirmative, which makes it unnecessary to consider Question 2.

As regards Question 3, Mrs Jenkins submits that the principle of equal pay is violated not only where an employer intends to discriminate against a woman on grounds of sex but also where the effect of his policy on pay is to discriminate against her on such grounds. If a condition or requirement which must be met in order to obtain equal pay for equal work operates so as to exclude women and cannot be shown to have a manifest relationship to the services involved, the application of such a condition or requirement must be considered to be contrary to the principle of equal pay. That is in application of the principle of "adverse impact" enunciated by the Supreme Court of the United States (in *Griggs* v *Duke Power Co)* and by the British Parliament in Section 1 (1) (b) of the Sex Discrimination Act.

Finally, as to the question of the direct effect of Article 119 and Article 1 of Council Directive 75/117/EEC, it may be recalled that, as the Court held in its decision of 8 April 1976 (Case 43/75 *Defrenne* v *Sabena),* these provisions are directly applicable to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay, including unequal pay for equal work carried out in the same establishment or service. The circumstances of this case clearly fall within the scope of the direct application of Article 119: it has been shown that Mrs Jenkins carried out like work with the male worker with whom she compares herself and there is no difficulty in establishing whether she received lower pay.

Although "adverse impact" is defined in the legislation of the United Kingdom as "indirect discrimination", it should not be confused with the "indirect and disguised discrimination" which has been described by the Court as falling outside the scope of the direct application of Article 119. Here, "indirect discrimination" is used in such a manner as to exclude any practice which, although not founded on any discriminatory motives, nevertheless has a discriminatory effect, and not as meaning discrimination which can only be suppressed by national or Community legislative measures more detailed than the provisions referred to above.

If, contrary to Mrs Jenkins's submissions, the circumstances envisaged by Question 3 are held to fall outside the scope of the direct application of Article 119, it will be necessary to rely on Article 1 of Council Directive 75/117/EEC, which requires the elimination of all discrimination on grounds of sex "with regard to all aspects and conditions of remuneration". That definition of discrimination extends to any condition which is capable of creating "indirect discrimination" ("adverse impact") in the sense already described. In such circumstances the principle of equal pay outlined in Article 119 of the Treaty and further defined in the first paragraph of Article 1 of the directive has direct effect in Member States so as to confer on individuals rights which the national courts are bound to protect.

As to Council Directive 75/117/EEC itself, Mrs Jenkins observes that it lays down standards aimed at facilitating the practical application of the principle of equal pay set out in Article 119. That aim cannot be effectively attained if individuals are prevented from relying upon the provisions of the directive in national courts. The first paragraph of Article 1 of the directive is sufficiently clear and precise to have direct effect, so that on the expiration of the period allowed to Member States for complying with the directive, it became complete and unconditionally applicable.

In its judgment of 15 June 1978 (Case 149/77 *Defrenne* v *Sabena)* the Court implied, moreover, that on the expiration of the period allowed to Member States for complying with Council Directive 76/207/EEC on equal treatment, some provisions of that directive would have direct effect. By analogy it must therefore be conceded that Article 1 of Council Directive 75/117/EEC now has direct effect in the circumstances of this case.

The Government of the *United Kingdom* observes, first, that the provisions of Community law referred to it in the request for a preliminary ruling are concerned solely with discrimination on the grounds of sex. If follows that those provisions are not applicable if a difference in pay is the consequence of factors unconnected with any discrimination on grounds of sex. Whether the difference may be so explained in any particular case is a question of fact for the national court to decide. In performing that duty, the national court may legitimately have regard to the considerations mentioned in Question 1

(or to considerations of a similar nature), not as considerations which are in themselves determinative, but in so far as the inference may properly be drawn from them that the difference in treatment is not, in reality, a discrimination based on sex.

The correctness of those submissions is fully supported by the practical application of them to cases such as this.

In this case it has been contended before the national court that the difference between the rates of pay depended solely upon the number of hours worked; that the fact that Mrs Jenkins was paid less than Mr Bannan was purely a coincidence and did not depend in any way on her sex; and that indeed there would have been the same difference in remuneration, but in favour of Mrs Jenkins, if she had worked full-time and Mr Bannan part-time.

According to the Government of the United Kingdom these are questions of fact which the national court must be able to decide without being fettered by a reply in the affirmative to Question 1 (a) or (b).

Thus it is maintained by the Government of the United Kingdom that the principle of equal pay contained in Article 119 of the Treaty and in Article 1 of Directive 75/117/EEC is only applicable where the difference in pay between a male employee and a female employee is the result of discrimination based on sex; that where it is the consequence of other factors, *ex hypothesi* it is not "based on sex" and therefore not within the ambit of either of those articles; that whether in any particular case discrimination is based on sex or other factors is a question of fact for the national court to determine; and, in particular, that the principle of equal pay does not require that pay for work at time rates shall be the same irrespective of the circumstances described in subparagraphs (a) and (b) of Question 1.

As regards Question 2 it is of the opinion that the only criterion which should be employed to determine whether the principle of equal pay applies in these circumstances is whether the difference in rates of pay is the result of a discrimination on the grounds of sex. The application of that criterion is a matter for the national courts which alone are in a position to undertake the detailed examination of the particular facts of individual cases.

Furthermore, it considers that there is no criterion other than that of whether or not the difference in treatment is a result of discrimination based on sex which may be identified or implied from or read into the wording of Article 119 of the Treaty or of Article 1 of Council Directive 75/117/EEC.

As to Question 3, the Government of the United Kingdom states that it cannot discern the precise scope of it. It observes, however, that even if the circumstances described in that question in fact obtained and were the result of discrimination based on sex, that would still constitute indirect and disguised discrimination, which falls outside the

sphere of application of the provisions referred to above.

In regard to Question 4, the Government of the United Kingdom concedes that in the event of the Court's replying to Question 1 in the affirmative, the direct effect of Article 119 could not be disputed in a case such as the present.

If the Court considers it necessary to interpret Article 1 of Council Directive 75/117/EEC as applying irrespective of the circumstances defined in subparagraphs (a) and (b) of Question 1, the Government of the United Kingdom submits that that article, so applied, does not have direct effect.

The Government of the *Kingdom of Belgium* explains that in Belgium the remuneration of part-time workers may be based on collective employment agreements or, as is more often the case, individual agreements. If the agreements are silent on the subject, part-time workers might nevertheless be given the right to remuneration in proportion to that laid down for full-time workers, as has been accepted, moreover, in some decided cases and by the Conseil National du Travail [National Labour Board]. It should, however, be emphasized that a difference in pay for part-time work as opposed to full-time work does not constitute a breach of the principle of equal pay in so far as there is no discrimination between male and female workers.

The *Commission of the European Communities* notes that the court which has made the reference has asked the Court of Justice to examine the questions referred to it exclusively on the basis of a comparison between the remuneration of a female part-time employee and that of a male full-time employee, although in this case there is the exceptional circumstance that Kingsgate also employed one (and only one) part-time male worker.

However, in the Commission's view, the interpretation which it would propose for Article 119 must apply in the same way to a situation in which not only women, but also men, perform like work on a part-time basis.

The first question which arises is whether the expression "the same job" may only apply where a male employee and a female employee work the same number of hours per week.

The Commission sets out, first, the arguments which may be used in favour of excluding equal pay in such a case, namely:

(a) that it is not "the same job";

(b) that it is in reality the same job, but that the fewer hours worked entail additional charges (principally financial) for the employer which may be taken into consideration to give the female part-time employee a lower time rate.

Next, it sets out the arguments which might be advanced in reply.

As to the view that the job is not the same, the language versions other than English would seem to suggest that it is in fact the "post" (slags arbejde, Arbeits-

platz, poste de travail, posto di lavoro, — functie) and not the number of hours worked which determines whether or not the two jobs are the same. Reference might also be made to the view of the Court in its recent judgment of 27 March 1980 (Case 129/72, *Macarthys Ltd* v *Wendy Smith*), that in deciding whether a female worker is performing the same work as a male worker regard must be had to the nature of her services.

If, in accordance with subparagraph (a) of the third paragraph of Article 119, pay for the same work at piece rates is to be calculated on the basis of the same unit of measurement, pay for the same work at time rates should obviously be established on the basis of the same time rate.

From a practical point of view, moreover, it might appear somewhat artificial, in the case of a reduction in the standard working week, for a job considered previously as different from another to become by virtue of that circumstance alone "the same job". The same artificial element might be found in the issue whether women working part-time do the same work as men who also work part-time, but for a different number of hours.

As to the extra cost, the position of the Commission has always been (and it refers in that regard to its recommendation of 20 July 1960, Bulletin of the European Communities, 1960, Vol. 6/7, p. 46) that "factors affecting the cost or yield of female labour shall not be taken into consideration in the case of work paid by time".

Any other approach, unless it were based, in each case, on an objective, expert and detailed analysis, would, by its subjective nature, continue to leave the door open to discrimination based on sex. Moreover, practical experience would seem to show at present that part-time work, as such, is in fact neither more nor less costly for the employer than full-time work.

In support of its views the Commission cites in addition the Resolution of the Conference of the Member States of 30 December 1961 on equalization of rates of pay for men and women, and an Opinion of 1 June 1978 of the Economic and Social Committee, both to the effect that pay for part-time work must be proportional to that for full-time work.

In the Commission's opinion, its conclusions remain applicable even if it is shown that there are male workers who work part-time and are paid in the same way as female part-time workers, since female part-time workers are no less discriminated against by comparison with male full-time workers performing the same work.

Of course, that does not exclude the possibility that a difference between two workers occupying the same post may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. Whether that is the case is a question of fact.

A reply to Questions 2 and 3 being therefore unnecessary, the Commission turns to Question 4, concerning the direct effect of Article 119 or of Council Directive 75/117/EEC.

It observes that once it is accepted that the concept of equal work contained in Article 119 extends to part-time work, any difference in rates of pay between the remuneration of male full-time employees and female part-time employees must be considered, on the criteria of interpretation expressed in the decisions of the Court, as direct and overt discrimination. In such circumstances there can be no doubt that Article 119 has direct effect. It thus becomes unnecessary to consider whether Council Directive 75/117/EEC has direct effect or not.

In conclusion, the Commission therefore suggests that the following reply be given to the question raised by the Employment Appeal Tribunal:

"1. The principle that men and women should receive equal pay for equal work enshrined in Article 119 of the EEC Treaty implies that the basic pay for work at time rates shall be the same for all employees doing the same job irrespective of the number of hours worked per week.

2. Should any amount additional to the basic time rate be paid to full-time (or part-time) employees in respect of their employment such amounts must depend on factors totally unconnected with the sex of the employees."

III — Oral procedure

Mrs J. P. Jenkins and the Commission of the European Communities presented oral argument at the sitting on 26 November 1980.

The Advocate General delivered his opinion at the sitting on 28 January 1981.

Decision

1 By an order dated 25 February 1980 which was received at the Court on 12 March 1980 the Employment Appeal Tribunal of the United Kingdom referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions as to the interpretation of Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal L 45, p. 19).

2 The questions were raised in the course of a dispute between a female employee working part-time and her employer, a manufacturer of women's

clothing, against whom she claimed that she was receiving an hourly rate of pay lower than that paid to one of her male colleagues employed full-time on the same work.

3 Mrs Jenkins took the view that such a difference in pay contravened the equality clause incorporated into her contract of employment by virtue of the Equal Pay Act 1970, Section 1 (2) (a) of which provides for equal pay for men and women in every case where "a woman is employed on like work with a man in the same employment".

4 The Industrial Tribunal, hearing the case at first instance, held in its decision of 5 February 1979 that in the case of part-time work the fact that the weekly working hours amounted, as in that case, to 75% of the full working hours was sufficient to constitute a "material difference" between part-time work and full-time work within the meaning of Section 1 (3) of the above-mentioned Act, according to which:

"An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his."

5 The plaintiff in the main action appealed against that decision to the Employment Appeal Tribunal, which decided that the dispute raised problems concerning the interpretation of Community law and referred a number of questions to the Court for a preliminary ruling.

6 According to the information in the order making the reference, prior to 1975 the employer did not pay the same wages to male and female employees but the hourly rates of pay were the same whether the work was part-time or full-time. From November 1975 the pay for full-time work (that is to say, the pay for those working 40 hours per week) became the same for male and female employees but the hourly rate for part-time work was fixed at a rate which was 10% lower than the hourly rate of pay for full-time work.

7 It also appears from the order making the reference that at the time of the proceedings before the Industrial Tribunal the part-time workers employed by the employer in question were all female with the exception of a sole male part-time worker who had just retired and who at the time had been authorized to continue working, exceptionally and for short periods, after the normal age of retirement.

8 On the basis of those facts the Employment Appeal Tribunal referred the following questions to the Court:

"1. Does the principle of equal pay, contained in Article 119 of the EEC Treaty and Article 1 of the Council Directive of 10 February 1975, require that pay for work at time rates shall be the same, irrespective:

(a) of the number of hours worked each week; or

(b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?

2. If the answer to Question 1 (a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

3. Would the answer to Question 1 (a) or (b) or 2 be different (and, if so, in what respects) if it were shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay?

4. Are the relevant provisions of Article 119 of the EEC Treaty or Article 1 of the said directive, as the case may be, directly applicable in Member States in the circumstances of the present case?"

First three questions

9 It appears from the first three questions and the reasons stated in the order making the reference that the national court is principally concerned to know whether a difference in the level of pay for work carried out part-time and the same work carried out full-time may amount to discrimination of a kind prohibited by Article 119 of the Treaty when the category of part-time workers is exclusively or predominantly comprised of women.

10 The answer to the questions thus understood is that the purpose of Article 119 is to ensure the application of the principle of equal pay for men and women for the same work. The differences in pay prohibited by that provision are therefore exclusively those based on the difference of the sex of the workers. Consequently the fact that part-time work is paid at an hourly rate lower than pay for full-time work does not amount *per se* to discrimination prohibited by Article 119 provided that the hourly rates are applied to workers belonging to either category without distinction based on sex.

11 If there is no such distinction, therefore, the fact that work paid at time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in Article 119 of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex.

12 Such may be the case, in particular, when by giving hourly rates of pay which are lower for part-time work than those for full-time work the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.

13 By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard

being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.

14 Where the hourly rate of pay differs according to whether the work is part-time or full-time it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker.

15 The reply to the first three questions must therefore be that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.

Fourth question

16 In the fourth and last question, the national court asks whether the provisions of Article 119 of the Treaty are directly applicable in the circumstances of this case.

17 As the Court has stated in previous decisions (judgment of 8 April 1976 in Case 43/75, *Defrenne* [1976] ECR 455; judgment of 27 March 1980 in Case 129/79, *Wendy Smith* [1980] ECR 1275 and judgment of 11 March 1981 in Case 69/80, *Worringham*), Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the Court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private.

18 Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation.

Article 1 of Council Directive 75/117/EEC of 10 February 1975

19 The national court also raises with regard to Article 1 of Council Directive 75/117/EEC of 10 February 1975 the same questions of interpretation as those examined above in relation to Article 119 of the Treaty.

20 As may be seen from the first recital in the preamble the primary objective of the above-mentioned directive is to implement the principle that men and women should receive equal pay which is "contained in Article 119 of the Treaty". For that purpose the fourth recital states that "it is desirable to reinforce the basic laws by standards aimed at facilitating the practical application of the principle of equality".

21 The provisions of Article 1 of that directive are confined, in the first paragraph, to restating the principle of equal pay set out in Article 119 of the Treaty and specify, in the second paragraph, the conditions for applying that principle where a job classification system is used for determining pay.

22 It follows, therefore, that Article 1 of Council Directive 75/117/EEC which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the Treaty in no way alters the content or scope of that principle as defined in the Treaty.

Costs

The costs incurred by the Government of the Kingdom of Belgium, the Government of the United Kingdom of Great Britain and Northern Ireland

and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As this case is, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Employment Appeal Tribunal by an order dated 25 February 1980, hereby rules:

1. **A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.**

2. **Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation.**

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans O'Keeffe

Bosco Touffait Due Everling

Delivered in open court in Luxembourg on 31 March 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President